



For a thriving New England

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Via Certified Mail, Return Receipt Requested

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RE: Notice of Violations and Intent to File Suit under the Clean Water Act

To Whom It May Concern:

The Conservation Law Foundation (CLF)¹ hereby gives notice of its intent to file suit pursuant to Section 505 of the Clean Water Act (the Act), 33 U.S.C. § 1365(a), for violations of the Act specified below. This letter (the Notice) constitutes notice pursuant to 40 C.F.R., part 135, of CLF's intention to file suit in United States District Court for the District of Rhode Island seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this Notice.

¹ CLF is a not-for-profit 501(C)(3) organization dedicated to the conservation and protection of New England's environment. Its mission includes the conservation and protection of the many uses of the waters in and around the Woonasquatucket River watershed for, among other things, fishing, recreation, scenic/aesthetic and scientific purposes. CLF's membership includes people who live in or near the Woonasquatucket River watershed, and use and enjoy the watershed for recreational, aesthetic, and/or scientific purposes. The interests of CLF's members are adversely affected by the Facility's discharges of stormwater pollution to the receiving waters without a permit and in violation of the Clean Water Act.

The subject of this action is two-fold. First, Material Concrete Corp., Material Equipment Corp., and Material Realty Inc., (collectively “Material”) are discharging stormwater directly associated with a construction sand and gravel and concrete facility located at 618 Greenville Road, North Smithfield, Rhode Island 02896 (hereinafter the “Facility”), to the waters of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B). Second, Material has failed to obtain coverage under any Clean Water Act permit including the Multi-Sector General Permit (MSGP) issued under the Rhode Island Pollutant Discharge Elimination System² (RIPDES) by the state of Rhode Island for industrial sources of polluted stormwater runoff, and failed to comply with the specific requirements of any such permit, in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

BACKGROUND

The Woonasquatucket River flows directly through the Facility. The Woonasquatucket River is nineteen miles long traveling from its headwaters in North Smithfield to its confluence with the Moshassuck River, where it forms the Providence River.³ The Providence River flows into Narragansett Bay. The relevant waterbody segment (Waterbody ID RI0002007R-10A) is approximately six and a half miles starting from the headwaters to Georgiaville Pond.⁴ The Environmental Protection Agency (EPA) has designated this section of the Woonasquatucket River as a habitat for “fish, shellfish, and wildlife protection and propagation, aquatic life harvesting, and recreation.”⁵

EPA has designated Waterbody ID RI0002007R-10A of the Woonasquatucket River as impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), for failure to meet minimum water quality standards.⁶ This segment of the Woonasquatucket River is impaired for fish and wildlife habitat; the identified cause of that impairment is zinc.⁷ Stormwater and urban-related runoff have been identified as probable sources of impairment for Waterbody RI0002007R-10A.⁸

The adjacent downstream segment of the Woonasquatucket River (Waterbody ID RI0002007R-10B) starts approximately four and a half miles downstream from the Facility. EPA has designated

² The Rhode Island MSGP is available at <http://www.dem.ri.gov/programs/benviron/water/permits/ripdes/pdfs/msgp.pdf>.

³ See “About the Watershed,” Woonasquatucket River Watershed Council, available at <http://wrwc.org/overview.php>

⁴ See 2014 Waterbody Report for Woonasquatucket River and Tributaries, available at https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=RI0002007R-10A&p_cycle=2014&p_state=RI&p_report_type=.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

Waterbody ID RI0002007R-10B as impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), for failure to meet minimum water quality standards.⁹ This segment of the Woonasquatucket River is impaired for fish, shellfish, and wildlife protection and propagation, and primary and secondary contact recreation.¹⁰ The causes of impairment are fecal coliform, mercury in the water column, and non-native aquatic plants.¹¹ The probable sources of impairment are introduction of non-native organisms (accidental or intentional), urban runoff/storm sewers, and other unknown sources.¹²

Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt.¹³ Industrial activities, such as material handling and storage, equipment maintenance and cleaning, industrial processing, and other operations that occur at industrial facilities, may be exposed to stormwater.¹⁴ Stormwater from industrial facilities, contaminated with pollutants, is then conveyed into nearby waterbodies.¹⁵

Material is required to apply for coverage under a Clean Water Act discharge permit such as the MSGP in order to discharge lawfully. Since at least 1987, Material has been required to apply for coverage under the MSGP by filing a Notice of Intent ("NOI"). On August 15, 2013, after expiration of the prior MSGP, the Rhode Island Department of Environmental Management issued a new MSGP requiring all covered facilities to file an NOI for coverage under the 2013 permit.¹⁶

Material has failed to obtain RIPDES permit coverage under the MSGP or any other valid authorization, at any time. Therefore, Material is operating in violation of the Clean Water Act.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

Material Equipment Corp., Material Concrete Corp., and Material Realty Inc. are the persons, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. Material Equipment Corp. has operated at the Facility since at least 1987, currently advertises as the operator of the Facility, and is registered with the Rhode Island Secretary of State Division of

⁹ See 2014 Waterbody Report for Woonasquatucket and Tributaries, available at https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=RI0002007R-10B&p_cycle=2014&p_state=RI&p_report_type=.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See 40 C.F.R. § 122.26(b)(13).

¹⁴ See 40 C.F.R. § 122.26(b)(14).

¹⁵ See 58 Fed. Reg. 61,146, 61,154 (November 19, 1993).

¹⁶ See MSGP I(C).

Business Services as the operator of the Facility.¹⁷ Material Equipment Corp. and its agents and directors, including but not limited to Robert A. Pezza, president, have operational control over the day-to-day industrial activities at this Facility. Therefore, they are responsible for managing stormwater at the Facility in compliance with the CWA. Material Concrete Corp. has operated at the Facility since at least 1992 and currently advertises as the operator of the Facility, and is registered with the Rhode Island Secretary of State Division of Business Services as the operator of the Facility.¹⁸ Material Concrete Corp. and its agents and directors, including but not limited to Robert A. Pezza, president, have operational control over the day-to-day industrial activities at this Facility. Therefore, they are responsible for managing stormwater at the Facility in compliance with the CWA. Material Reality Inc., has operated at the Facility since at least 2001, currently advertises as the operator of the Facility, and is registered with the Rhode Island Secretary of State Division of Business Services as the Operator of the Facility.¹⁹ Material Reality Inc. and its agents and directors, including but not limited to Thomas Plunkett, registered agent, have operational control over the day-to-day industrial activities at this Facility. Therefore, they are responsible for managing stormwater at the Facility in compliance with the CWA.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the construction sand and gravel facility (SIC 1442) located at 618 Greenville Road, North Smithfield, Rhode Island 02896.

ACTIVITIES ALLEGED TO BE VIOLATIONS

Material has engaged and continues to engage in “industrial activities,” and its operations fall under SIC 1442 and 3271-3275 within the meaning of 40 C.F.R. § 122.26(b)(14)(vi).²⁰ Because the Facility has primary SIC Codes of 1442 and 3273 and discharges stormwater associated with industrial activity, Material is required to apply for and obtain coverage, and to comply with the requirements of a discharge permit such as the MSGP.

¹⁷ See

http://ucc.state.ri.us/CorpWeb/CorpSearch/CorpSummary.aspx?FEIN=000045091&SEARCH_TYPE=1.

¹⁸ See

http://ucc.state.ri.us/CorpWeb/CorpSearch/CorpSummary.aspx?FEIN=000070327&SEARCH_TYPE=1.

¹⁹ See

http://ucc.state.ri.us/CorpWeb/CorpSearch/CorpSummary.aspx?FEIN=000117030&SEARCH_TYPE=1.

²⁰ See MSGP, Appendix B: Facilities and Activities Covered, Table B-1. Construction Sand and Gravel (SIC 1442) and Glass, Clay, Concrete, and Gypsum Products (SIC 3271-3275) facilities are subject to the requirements of the MSGP for stormwater discharges.

Activities at the Facility include, but are not limited to: storing, moving, and processing sand, gravel, cement, fly ash, and other materials outside or otherwise exposing them to the elements; operating and storing heavy machinery and equipment outdoors; and driving vehicles on and off the Facility thereby tracking pollutants off-site. All of these activities at the Facility have contaminated the site with industrial pollutants.

Sand and gravel (exposed aggregate), cement, fly ash, and other materials; machinery and equipment; and vehicles at the Facility are exposed to precipitation and snowmelt. Precipitation falls on and flows over sand, gravel, cement, and fly ash piles; machinery and equipment; vehicles; and other exposed materials at the Facility, picking up dust, total suspended solids (TSS), total dissolved solids (TDS), diesel/gas fuel, oil, heavy metals, trash, and other pollutants associated with the Facility's operations. The polluted runoff is then conveyed off-site into waters of the United States.

In addition, to the extent that Material uses water in its industrial processes, including but not limited to washing gravel and crushed stone and spraying on rock crushing and sorting machinery, that water becomes "process wastewater" (also referred to as "process water") as defined in 40 C.F.R. § 122.2.²¹ Discharges of process wastewater are not covered under the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity. Discharges of process wastewater must instead be covered under an individual RIPDES permit. CLF intends to pursue claims related to Material's unpermitted discharges of process water to waters of the United States.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid discharge permit.²² Material discharges stormwater associated with its industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), from its facility into waters of the United States. Because Material has not obtained coverage for these stormwater discharges under the MSGP or an individual RIPDES permit, it is illegally discharging stormwater without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).²³ By failing to apply for permit coverage

²¹ Defining "Process wastewater" as "any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product."

²² 33 U.S.C. § 1311(a).

²³ See 33 U.S.C. § 1362(12); 40 C.F.R. § 122.2; MSGP, Appendix A: Definitions, Abbreviations, and Acronyms (defining the term "discharge of a pollutant" as "any addition of any 'pollutant' to 'waters of the State' from any 'point source'").

and comply with the specific requirements of the MSGP, Material is in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

a. Material is discharging stormwater to waters of the United States without a permit.

Material is an industrial discharger with primary SIC Codes of 1442 and 3271-3275, which means that pursuant to Section 402(p) of the Act, 33 U.S.C. § 1342(p), Material is obligated to apply for coverage under the MSGP or obtain other legal authorization. Because Material has operated and continues to operate without a permit under Section 402(p), Material is in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

In addition, during storm events, Material's industrial activities at its Facility have resulted in a "discharge of pollutants" within the meaning of 33 U.S.C. § 1362(12) and "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14), from its Facility on each and every day that there has been a measurable precipitation event of above 0.1 inches. There have been many such storm events since 1987. The Facility is generating and conveying pollutants from at least the following "point sources": vehicles and equipment left outdoors; vehicles driving on and off the Facility; and channels, ditches, discrete fissures, containers, and other conveyances to waters of the United States.²⁴ The Woonasquatucket River is considered a "water of the United States" as defined in 40 C.F.R. § 122.2, and therefore is a "navigable water" as defined in 33 U.S.C. § 1362(7). The Facility is discharging this industrial stormwater without the permit required under Section 402 of the Act, 33 U.S.C. § 1342.

b. Material is violating the Clean Water Act by failing to obtain coverage and failing to comply with the requirements of the MSGP.

Material is violating 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1), by failing to apply for and obtain coverage, and to comply with the requirements of the MSGP.²⁵ The Facility has primary SIC Codes of 1442 and 3271-3275 and must obtain coverage under the MSGP for its stormwater discharges and for stormwater discharges from any co-located industrial activities.²⁶ Material's failure to obtain coverage and comply with the permit conditions is in violation of the MSGP and 33 U.S.C. § 1342(p) of the Clean Water Act.²⁷

²⁴ These discharges constitute "point sources" as defined by 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2. Under 40 C.F.R. § 122.2 and MSGP Appendix A, "discharge of a pollutant" includes "surface runoff which is collected or channeled by man."

²⁵ MSGP parts I and X.

²⁶ See MSGP part VIII(J) and VIII(E).

²⁷ A thorough search of EPA's facility databases shows Material as "unpermitted." Therefore, there is no Clean Water Act permit coverage for Material. See EPA Enforcement and Compliance History Online

1) Material Must Develop and Implement a Storm Water Management Plan (SWMP).

As a prerequisite to obtaining coverage under the MSGP, Material must prepare a Storm Water Management Plan ("SWMP").²⁸ The SWMP must include, but is not limited to, the following: information related to a company stormwater pollution prevention team, a site description and general location map, a summary of pollutant sources, a description of control measures, and schedules and procedures pertaining to control measures and monitoring.²⁹ Material has failed to develop a SWMP in accordance with the MSGP's requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

2) Material Must Submit to the Rhode Island Department of Environmental Management a Complete Notice of Intent to be Covered under the MSGP.

To be eligible to discharge under the MSGP, Material must submit a complete Notice of Intent ("NOI") to the Director of the Rhode Island Department of Environmental Management (RIDEM).³⁰ Material has failed to prepare and file an NOI meeting all applicable requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

3) Material Must Take Control Measures and Meet Water-Quality Effluent Limitations.

To be eligible to discharge under the MSGP, Material must select, design, install, and implement control measures (including best management practices) to prevent polluted stormwater discharges from reaching nearby waterbodies.³¹ Material must address the selection and design considerations set forth in the MSGP, meet the non-numeric effluent limitations established by the MSGP, and meet limits contained in applicable permit effluent limitations guidelines.³² If the control measures are not achieving their intended effect of minimizing pollutant discharges, the permittee must modify these control measures as expeditiously as practicable.³³ Material has failed to cover the

(ECHO), <http://echo.epa.gov/facilities/facility-search>; EPA Permit Compliance System (PCS) and Integrated Compliance Information System (ICIS), <http://www.epa.gov/enviro/facts/pcs-icis/search.html>. By contrast, searches of these databases for several other sand and gravel and concrete facilities throughout Rhode Island show permit coverage.

²⁸ See MSGP part V.

²⁹ See MSGP part V(F).

³⁰ See MSGP part I(C)(1)(a).

³¹ See MSGP part II(A).

³² *Id.*

³³ See MSGP part III.

materials and operations that may result in polluted stormwater runoff. Material has not implemented required control measures in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

4) Material Must Conduct Routine Facility Inspections.

To be eligible to discharge under the MSGP, Material must conduct routine inspections by qualified personnel, with at least one member of the Facility's stormwater pollution prevention team participating, of all areas of the Facility where industrial materials or activities are exposed to stormwater.³⁴ Routine inspections must be conducted at least quarterly but in many instances monthly inspections are most appropriate.³⁵ These inspections must occur when the Facility is in operation.³⁶ The schedule of these inspections must be included in the Facility's SWMP.³⁷ Material has failed to conduct the required routine inspections in accordance with the MSGP's requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

5) Material Must Comply with the Required Monitoring and Sampling Procedures.

To be eligible to discharge under the MSGP, Material must collect and analyze stormwater samples and document monitoring activities consistent with the procedures in the MSGP.³⁸ The MSGP requires different types of analytical monitoring (one or more of which may apply) including semiannual benchmark monitoring, annual effluent limitations guidelines monitoring, and other monitoring as required by the Director.³⁹ An operator must monitor outfalls including each outfall identified in the SWMP covered by a numeric effluent limit.⁴⁰ Required monitoring must be performed after stormwater events that result in an actual discharge on a required schedule.⁴¹ Furthermore, because the Woonasquatucket River is "impaired" under 33 U.S.C. § 1313(d), Material must monitor for all pollutants for which Woonasquatucket is impaired.⁴² All monitoring data collected under the Permit must be reported to RIDEM no later than 31 days after the last day of the monitoring period for all monitored outfalls for the reporting period.⁴³ Material has failed to conduct the required monitoring under the MSGP and has failed to submit the required

³⁴ See MSGP part IV(A).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See MSGP part VI.

³⁹ See MSGP part VI(B).

⁴⁰ See MSGP part VI(A)(1).

⁴¹ See MSGP part VI(A)(3).

⁴² See MSGP part VI(B)(3).

⁴³ See MSGP part VII(A).

monitoring reports to RIDEM in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

6) Material Must Carry out Required Reporting and Recordkeeping.

Material must maintain and submit any and all required monitoring data.⁴⁴ Such monitoring data includes the following: an annual report to RIDEM which includes the Facility's findings from the annual comprehensive site inspection and any documentation of correction actions;⁴⁵ an Exceedance Report to the Department no later than 30 days after receipt of the lab results if any of the follow-up monitoring shows any exceedances of a numeric effluent limit;⁴⁶ and any other required reports under the MSGP.⁴⁷ Material has failed to maintain the required records and failed to submit all required monitoring data under the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

7) Material Must Comply with the Requirements of MSGP Subpart J.

Material must also comply with the sector-specific requirements contained in Subpart J of the MSGP.⁴⁸ Subpart J requires construction sand and gravel facilities to implement additional technology-based effluent limits,⁴⁹ meet additional SWMP and inspection requirements,⁵⁰ and monitor stormwater discharges for compliance with the benchmark limitations applicable specifically to construction sand and gravel facilities.⁵¹ Material has failed to comply with the additional requirements of Subpart J of the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

8) Material Concrete Must Comply with MSGP Subpart E

Material must also comply with the sector-specific requirements contained in Subpart E of the MSGP.⁵² Subpart E requires concrete products facilities to implement additional technology-based effluent limits,⁵³ meet additional SWMP requirements,⁵⁴ and monitor stormwater

⁴⁴ See MSGP part VII(A).

⁴⁵ See MSGP part VII(B).

⁴⁶ See MSGP part VII(C).

⁴⁷ See MSGP part VII(D).

⁴⁸ See MSGP, Appendix B, Table B-1, Sector J; MSGP part VIII(J).

⁴⁹ See MSGP part VIII(J)(4) & (5).

⁵⁰ See MSGP part VIII(J)(6) & (7).

⁵¹ See MSGP part VIII(J)(8).

⁵² See MSGP, Appendix D, Table D-1, Part 8.E.

⁵³ See MSGP Part VIII(E)(2)

⁵⁴ See MSGP Part VIII(E)(3)

discharges for compliance with the benchmark limitations applicable specifically to concrete products facilities.⁵⁵ Material has failed to comply with the requirements of Subpart E of the MSGP, in violation of the MSGP and Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

DATES OF VIOLATION

Each day on which Material operates its Facility without permit coverage or discharges stormwater from the Facility without a permit is a separate and distinct violation of Section 301(a) and 402(p)(2)(B) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

Each day on which Material operates its Facility without individual permit coverage or discharges process water from the Facility without a permit is a separate and distinct violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311(a).

Material has discharged stormwater without a permit in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), on every day, since at December 19, 2012, on which there has been a measurable precipitation event.

Every day, since at least December 19, 2012, on which Material has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of the MSGP is a violation of Section 402(p)(3)(A) and (p)(4)(A) of the CWA, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A).

Every day, since at least December 19, 2012, on which Material has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of an individual RIPDES permit is a violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311(a).

These violations are ongoing and continuous, and barring a change in the stormwater management controls and process water controls at the Facility and full compliance with the permitting requirements of the Clean Water Act, these violations will continue indefinitely.

RELIEF REQUESTED

Material Concrete Corp., Material Equipment Corp., Material Realty Inc., and the Facility owner(s) and operator(s) are liable for the above-described violations occurring prior to the date of this letter, and for every day that these violations continue. Each separate violation of the Act subjects Material to a penalty of up to \$37,500 per day per violation for all Clean Water Act violations occurring between January 12, 2009 and November 2, 2015; up to \$51,570 per day per violation for all CWA violations occurring after November 2, 2015 and assessed on or after

⁵⁵ See MSGP Part VIII(E)(4).

August 1, 2016 but before January 15, 2017; and up to \$52,414 per day per violation for all Clean Water Act violations occurring after November 2, 2015 and assessed on or after January 15, 2017, pursuant to § 309(d) of the CWA, 33 U.S.C. § 1319(d), and the regulations governing the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. §§ 19.2, 19.4.⁵⁶ CLF will seek assessment of the full penalties allowed by law.


In addition to civil penalties, CLF will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and such other relief as permitted by law. CLF will seek an order from the Court requiring Material to correct all identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with matter.

CONCLUSION

During the 60-day notice period, CLF is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. If you wish to pursue such discussions, please have your attorney contact Max Greene within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.

Sincerely,


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⁵⁶ See 33 U.S.C. §§ 1319(d), 1365(a); 40 C.F.R. §§ 19.1–19.4.



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